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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 375

ARMOUR AND COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The original opinion of the court below (R. 517–529), and its opinion on rehearing (R. 558–559), are reported at 154 F. 2d 570. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 136–162) are reported in 54 N. L. R. B. 1005. The decision and direction of election in a prior representation case which forms part of the record in this case (R. 464–470) is reported in 49 N. L. R. B. 688. The certification of representatives issued by the Board following the election (R. 470–471) is unreported.

JURISDICTION

The decree of the court below (R. 529–531) was entered on November 26, 1945, and was modified by order of the court on January 8, 1946 (R. 560). The petition for rehearing filed by the Board (R. 561–578) was denied on May 9, 1946 (R. 598). The petition for a writ of certiorari was filed on August 8, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the Board's finding that petitioner violated Section 8 (1) of the Act by questioning employees concerning their union activities, by threatening to transfer employees to other jobs unless they relinquished membership in the Union, by discriminatorily discharging three employees for remaining members of the Union, and by refusing to bargain with the certified representative of its employees is supported by substantial evidence.

2. Whether the Board could properly find that "checkers" and "cost clerks" employed in petitioner's industrial engineering department, who, in the course of their duties, acquire information which petitioner desires to withhold from its competitors and from the Union, are "employees" within the meaning of the Act.

3. Whether the Board could properly find that by refusing to permit three such employees to retain their positions and by transferring them to lower paying production jobs because they remained members of the Union petitioner violated Section 8 (3).

4. Whether the Board could properly order petitioner to make whole such employees for losses sustained by them as a result of petitioner's discrimination when the employees refused to accept the lower paying jobs which petitioner discriminatorily offered them.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra,* pp. 24–28.

STATEMENT

Upon the usual proceedings under Section 10 of the Act (R. 131–135), the Board, on February 2, 1944, issued its findings of fact, conclusions of law and order (R. 136–162). The facts as found by the Board and as shown by the evidence may be summarized as follows:[1]

On June 24, 1943, following the usual proceedings under Section 9 (R. 143, 144; 6–10), the Board certified Packinghouse Workers Organizing Committee, affiliated with the Congress of

[1] In the following statement, record references preceding the semicolons are to the Board's findings; succeeding references are to the supporting evidence.

Industrial Organizations (hereinafter called the Union), a labor organization which already represented petitioner's production and maintenance employees (R. 144; 12), as exclusive representative of a separate bargaining unit composed of the plant clerks employed at petitioner's Kansas City, Kansas, plant (R. 144; 470–471).[2] On August 31, 1943, petitioner refused to bargain with the Union as the representative of the plant clerks on the ground that the plant clerks were not "employees" within the meaning of the Act (R. 144–146; 473–474, 165). Reaffirming its findings made in the prior decision and direction of election (*supra,* note 2) the Board concluded that the plant clerks were "employees", and that, by refusing to deal with their certified representative, petitioner violated Section 8 (5) and (1) of the Act (R. 144–145).[3]

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[2] The certification was predicated upon findings made in the Board's decision and direction of election that the plant clerks are employees within the meaning of the Act and constitute an appropriate bargaining unit despite the fact that during the course of their duties they acquire information which petitioner regards as "confidential" (R. 466–469; 55, 61, 97, 98–99), and upon the results of an election conducted pursuant to the Board's direction in which the Union received a majority of the votes cast (R. 470–471).

[3] Petitioner does not here contest the validity of the Board's findings respecting the plant clerks (Pet. 16–17), nor does it question the validity of that portion of the Board's order, enforced by the court below, which requires petitioner to bargain with the Union as the representative of the plant clerks (R. 140, 518–524, 530).

On August 2 or 3, 1943, a number of the clerical employees in respondent's industrial engineering department, a group distinct from the plant clerks (R. 148; 229–230, 231–232), attended an organizational meeting of the Union (R. 147; 174–175, 226, 252). Among them were Patricia M. Cornforth, Glenn Cowger, and Roy W. Donahue (*id.*). Cornforth and Donahue were employed as "checkers" (R. 148; 166–167, 246) and Cowger as a "cost clerk" (R. 148; 223).

Shortly thereafter, on or about August 9, Charles L. Campbell, general superintendent of respondent's plant (R. 146, 148; 176, 442), summoned and addressed all 15 of the employees in the Industrial Engineering Department (R. 146; 178, 180–182, 226–227, 442). Reading from a prepared statement (*id.*, R. 464), Campbell first referred to the possibility of their joining a union (R. 146; 180). He then explained that respondent's employees were divided by law into "two well defined groups of employees, the production group and the management group," and that, because their duties were "of a confidential nature," the employees in the Industrial Engineering Department were "clearly within the management group" (R. 146–147; 180–181). Campbell then stated that "we will not permit management employees in the Industrial Engineering Group to become members of a labor organization, and at the same time retain their present status as management

representatives" (*id.*). He therefore advised the employees that each of them must immediately make a choice or "election" between union affiliation and his job in the industrial engineering department, and that if the employee chose union affiliation, he would be transferred to production work (R. 147; 181–182).

At Campbell's insistence that he be informed of this "election" by the end of the day, some of the employees told him they did not want to join the Union (R. 148; 178). The others, including Conforth, Cowger, and Donahue, after concluding in a discussion among themselves that they were "not strong enough" to resist, informed Campbell that, in order to keep the jobs they then held, they would not join the Union (R. 147; 179, 183, 229, 230, 252). Nevertheless, Cornforth, Cowger, and Donahue attended a meeting of the Union on August 16 (R. 147; 175, 230, 248), when Cowger and Donahue were elected president and treasurer, respectively, of the union group (R. 147; 230, 245, 253).

Although these employees had not informed Campbell of their attendance at the meeting (R. 147; 461), on the very next day Campbell notified Cornforth, Cowger, and Donahue that, since they had persisted in their union membership and activities, their transfers to production jobs would become effective the following day (R. 147; 175–176, 248). The production jobs to which the em-

ployees were to be transferred paid substantially lower wages and were not equivalent to their clerical jobs in the nature of work (R. 147–148; 446).[4] Under the circumstances, Cornforth, Cowger, and Donahue refused to accept the transfers, and their employment was thereupon terminated (R. 147; 176, 443–444).[5]

Checkers and cost clerks employed in petitioner's industrial engineering department are clerical employees whose duties consist respectively of compiling and checking production data against standards furnished by the time study division of the department, and computing labor costs of the various departments for the

[4] The evidence shows, and the court below noted, that Donahue was informed that he was thereafter to work as a common laborer in the smokehouse, a job which paid 70 cents an hour in contrast with the 95 cents per hour which Donahue was then being paid (R. 525; 249, 457–458). Campbell told Cowger that his production job was to be in the box shop at 70 cents per hour as compared with his then current rate of 82½ cents per hour (R. 525–526; 231, 241, 445, 446). While Campbell did not tell Cornforth what production job she was to fill (R. 526; 177, 190–191), it was apparent to her (R. 526; 445, 190–191) that, as in the cases of Cowger and Donahue, her wages would be reduced.

[5] The evidence shows that a few days later Campbell notified each of the employees that respondent was "holding a position open for you in the plant" (R. 444, 191, 241–242, 251). As the court below stated, however (R. 526), and as Campbell admitted at the hearing (R. 444–445), this offer on its face and in fact referred to the production jobs and not jobs from which the three employees had been ousted because of their union membership and activities.

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use of the accounting office (R. 148–149; 172–173, 222–226, 242, 246, 255).* Checkers issue no instructions either to supervisors or to production employees (R. 149–150; 186, 342–343) and, except in instances where only a single employee is

* The evidence shows, and the court below noted, that the checkers are "fact finding employees" (R. 526; 246, 255) who compile weekly reports setting forth the production figures, the standards, the number of man-hours worked, and the time allowances for "day work" (tasks for which respondent has no prescribed time standards or job descriptions), in each of the departments assigned to them (R. 526; 185, 321, 330, 331–332, 350, 353, 422, 436–437). Their procedure is to copy these figures from daily production reports furnished by the plant clerks, using identical daily forms (R. 526; 168–169, 187, 326, 422, 454), and then to assemble them in weekly form for the use of the division heads as well as comptometer operators and the cost clerks (R. 526; 436–437, 186, 318, 414–415).

In addition to compiling these reports, the checkers visit the departments assigned to them to discuss with the foremen and the plant clerks any apparent errors in the figures on the plant clerks' reports (R. 526; 185–187, 325–327, 361) and to "spot" check the performance of the various operations against the job description both as to method and the number of men employed (R. 526–527; 187–188, 194–195, 237–238, 245–246). Spot checking is done both as a matter of routine and on special instructions of the assistant superintendent in charge of the Industrial Engineering Department when weekly reports show a low proficiency in particular production departments (R. 527; 318, 330–331). In the course of this work, the checkers call the foremen's attention to any deviations from job descriptions or standards (R. 527; 257–258), discuss with the foremen the allowances requested for "day work" (R. 527; 331, 321), and occasionally make suggestions to the foremen as to more efficient ways of performing a job (R. 527; 315–317, 354–355, 371, 376–378, 421–422, 451–452). Their functions in these respects are

engaged on a particular job classification, make no reports reflecting the efficiency of individual employees (R. 149; 174, 184–186, 247, 369, 447–449). Neither checkers nor cost clerks have any authority to hire or discharge employees, or to make any recommendations, either with respect to such action (R. 149; 172, 247–248), or with respect to promotion or other changes in job status of individual employees (R. 149; 172, 174, 246–248). Neither group of employees is concerned with or consulted about petitioner's labor relations, nor does either acquire confidential information concerning such matters (R. 150–151; 225–226, 360).

As in the case of the plant clerks (*supra*, p. 4), petitioner contended before the Board (R. 357–358) that the checkers' "confidential information" concerning job descriptions and standards and the cost clerks' knowledge of production costs make them representatives of management and exclude them from the statutory

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purely advisory, and decision as to what, if any, action is to be taken is left to the foremen or division heads (R. 527; 246, 257–258, 307–308, 369, 374, 354–355, 413–414).

The cost clerk's job likewise is purely clerical. He posts the plant clerks' and checkers' labor figures on an account sheet, known as a "spread sheet," allocating the total labor cost to departmental classifications meeting the accounting department's requirements (R. 527; 224–226, 242). He deals with labor costs only in terms of man-hours and not in terms of dollars and cents. His knowledge of wage rates extends merely to those of the foremen and plant clerks and not to those of the rank and file production employees (R. 527; 225–226).

definition of "employee". Similar contentions have often been urged before the Board and have been consistently rejected.[7] As the Board stated in reply to petitioner's identical objection to self-organization by the plant clerks (R. 468, 145): "We see no necessity for any conflict between self-organization for the purposes of collective bargaining and the faithful performance of duty. In any event, the remedy for inefficiency or wilful disregard or neglect of duty on the part of these employees lies implicitly in the power of the Company to discipline or discharge them." Moreover, as the Board noted, while petitioner considers the information concerning job descriptions and standards of production employees "confidential" in the sense that it does not desire to have such material disclosed to its business competitors, petitioner admittedly discloses this infor-

[7] The Board has repeatedly found that those who perform functions such as are here involved and have access to confidential information of the kind which is here available to the employees in question are "employees" within the meaning of the Act. See e. g., *Matter of Cramp Shipbuilding Company*, 46 N. L. R. B. 115, 118–120; *Matter of Yellow Truck & Coach Mfg. Co.*, 36 N. L. R. B. 876, 879; *Matter of Mueller Brass Co.*, 39 N. L. R. B. 167, 171–172; *Matter of Bethlehem Steel Company*, 46 N. L. R. B. 1166, 1168; *Matter of Bethlehem-Sparrows Point Shipyard, Inc.*, 49 N. L. R. B. 762, 764–765; *Matter of Phillips Petroleum Company*, 48 N. L. R. B. 934, 936; *Matter of Westinghouse Electric and Manufacturing Co.*, 47 N. L. R. B. 21, 23–24; *Matter of Wenatchee Alloys, Inc.*, 51 N. L. R. B. 229; *Matter of Intercontinent Aircraft Corp.*, 50 N. L. R. B. 99, 102; *Matter of The Raleigh Hotel Company*, 49 N. L. R. B. 771, 772–774.

mation to the Union, as it is required to do under the term of its contract (R. 150; 55, 97, 98–99, 298–299, 345, 455). The Board therefore concluded that the checkers and cost clerks were employees within the meaning of the Act (R. 148, 150–151).

The Board found that by imposing upon its employees in the industrial engineering department on August 9, 1945, the alternative of resignation from the Union or dismissal from their jobs in that department; by requiring the employees immediately to "elect" between these alternatives and to inform petitioner of their decision, petitioner engaged in "threat and coercion" thereby interfering with the exercise of the rights guaranteed these employees in Section 7 of the Act, in violation of Section 8 (1) (R. 151, 159). The Board further found that by removing Cornforth, Cowger and Donahue from their jobs in the industrial engineering department on August 17, 1943, and by offering these employees lower paying production jobs because they had remained members of the Union, petitioner engaged in discriminatory conduct tantamount to discharge, in violation of Section 8 (1) and 8 (3) of the Act (R. 147–148, 151–152, 159).

In June 1943, 15 or 20 employees in the plant's sales office signed a "petition" indicating their interest in an "office union" (R. 152–153; 196–197). A few days after the petition was first

circulated, Cane, one of the signers, was summoned by General Sales Manager Elder (R. 153; 197–198). Although Elder told Cane that respondent had no objection to the employees' joining a union (R. 153; 200), he also said, with obvious reference to the circulation of the petition, "I can fire you for this, but I won't, I want to find out what your difficulties are" (R. 153; 199). Shortly thereafter, Office Manager Thompson asked Cane and two other employees to show him the petition and requested an explanation as to why it was circulated (R. 153; 200–201). Upon reading the petition, Thompson noted the names of the subscribers and commented that some of them had not been with the Company very long (R. 154; 200).[8]

In light of petitioner's refusal to bargain with the Union as the certified representative of the plant clerks in violation of Section 8 (5) and (1), (*supra*, p. 4), of the threats and coercion which petitioner utilized to thwart the organizational activities of the employees in the industrial engi-

[8] The evidence shows, and the court below noted, that in addition Thompson referred to the fact that the petition had also been signed by some of the older employees, whom he said it would be respondent's normal policy to "take care of" and retain when the newer employees should lose their jobs (R. 528; 200). At about the same time, Sales Manager Cerf asked Cane about the petition and said "that he was kind of lost because it started in his department, and he didn't know a thing about it until * * * somebody else mentioned it to him" (R. 529; 201–202).

neering department in violation of Section 8 (1), (*supra,* pp. 5–6), and of the discriminatory discharges whereby petitioner exacted reprisal against three employees who refused to relinquish membership in the Union in violation of section 8 (3) and (1) (*supra,* pp. 6–7), the Board concluded that by questioning employees concerning the union petition, and by scrutinizing the petition and the names of the employees which appeared thereon, petitioner had engaged in "unwarranted prying * * * into the organizational activities of its employees," thereby additionally violating Section 8 (1) of the Act (R. 154, 137, 139).

On the basis of the foregoing findings the Board ordered petitioner, *inter alia,* to reinstate with back pay the three employees found to have been discriminatorily discharged and to cease and desist from in any manner interfering with, restraining, or coercing its employees in the exercise of their rights as guaranteed in Section 7 of the Act (R. 139–141).

On January 3, 1945, the Board filed in the court below a petition to enforce the Board's order (R. 1–2). On November 5, 1945, the court entered its opinion (R. 517–529), in which it held, *inter alia,* that the checkers and cost clerks, like the plant clerks, are "employees" within the meaning of the Act (R. 527, 522–523); that petitioner's interest in withholding from outsiders

the "confidential" information to which these employees have access can be adequately protected by requiring the employees to keep such information secret (R. 522); and that, consequently, petitioner's discriminatory transfer of the three employees to lower paying production jobs was violative of Section 8 (3) (R. 524–527). The court further rejected petitioner's contention that by refusing to accept the lower paying production jobs which petitioner discriminatorily offered, the three discharged employees wilfully incurred losses, and should be charged with such earnings as they would have received had they submitted to petitioner's discrimination against them. The court pointed out that the employees "were not required to submit to the discrimination as the price for Union affiliation. They were in effect discharged from the jobs they were entitled to hold. Under the circumstances, their refusal to accept the discriminatory jobs was not willful" (R. 528). On November 26, 1945, the court entered its decree enforcing the Board's order in full (R. 529–531). On December 14, 1945, petitioner filed a petition for rehearing, alleging, *inter alia,* that the court erred in requiring petitioner to reinstate Cornforth, Cowger and Donahue to positions in which they would have access to confidential information (R. 551–552). On January 8, 1946, the court entered its opinion on rehearing in which it again rejected this conten-

tion (R. 558–559). The court stated: "It is our opinion that the fact that such former employees belong to the union and, if restored to their former positions will acquire confidential information respecting Armour's operating and production costs will not justify a refusal to reinstate them to their former positions" (R. 559). On the same day the court entered an order modifying its decree in a manner not here material (R. 560).[9]

ARGUMENT

1. Petitioner contends (Pet. 2–3, 8–9, 12–14, Br. 4–5, 11–12, 14–29) that substantial evidence is lacking to support the Board's finding that petitioner violated Section 8 (1) of the Act by questioning employees concerning their union activities and engaging in surveillance of the union petition (*supra*, pp. 11–13). The argument is that the evidence of Cane alone is insufficient and that

[9] Relying upon the decision of this Court in *May Department Stores* v. *National Labor Relations Board*, 326 U. S. 376, the Court substituted for the general cease and desist provision of the Board's order a provision requiring petitioner to refrain merely "from making inquiry" into the concerted activities of its employees (R. 558–559, 560). The Court interpreted the *May* decision as holding that a broader provision was not warranted where the additional violations of Section 8 (1) and (3) were predicated on a "good faith contention" that the employees whose rights were infringed were not entitled to the benefits of the Act. While we believe that in so holding the court below erred (R. 563–575), we have not presented that question in this case.

findings as to other acts than mere surveillance are essential to a Section 8 (1) violation. But the Board's conclusion as to violation of Section 8 (1) rests not only on the finding and testimony referred to but on other findings that petitioner had violated Section 8 (1) by such illegal conduct as, for example, threatening to discharge office employees who persisted in remaining members of the Union (*supra,* pp. 5–6, 11, 13), discharging three such employees who refused to relinquish their rights under the Act (*supra,* pp. 6–7, 11, 13), and refusing to bargain with the certified representative of its plant clerks (*supra,* pp. 4, 12). While it may be true, as petitioner asserts (Pet. 16–17, Br. 11, 16–22, 32–34) and as the court below inferred (R. 558), that petitioner's opposition to the exercise by its office and clerical employees of the rights guaranteed under the Act was predicated upon a good faith belief that these employees were not protected by the Act, it is indisputable that petitioner manifested its hostility to their exercise of self-organizational rights by tactics which the statute unequivocally condemns. Under these circumstances, contrary to petitioner's contention (Pet. 2–4, 9–11, 12–15, Br. 20–22), it is clearly irrelevant whether or not petitioner's hostility to self-organization and to collective bargaining extended to other categories of its employees; petitioner cannot claim immunity for its illegal deprivation of the rights of certain of its em-

ployees on the plea that it has not similarly deprived other employees of their rights.

That threats and economic reprisals, and the unwarranted prying into the organizational affairs of employees normally have a coercive effect is too well settled to require citation of authority. The cases upon which petitioner relies to establish a conflict with the decision below (Pet. 10–11, Br. 26–28) are not in point, for, as petitioner concedes (*id.*), in each of the cases in which the Circuit Courts of Appeals found evidence of surveillance or questioning insufficient to sustain a Board finding of violation of Section 8 (1), such evidence constituted the sole support for the Board's finding. Having properly found that under the circumstances here present petitioner's surveillance of the union petition and its interrogation of employees concerning their union activities was violative of Section 8 (1) of the Act, the court below was clearly warranted in ordering petitioner, at least, to refrain from further engaging in the very same illegal practice. *May Department Stores* v. *National Labor Relations Board,* 326 U. S. 376, 393; *National Labor Board* v. *Express Publishing Co.,* 312 U. S. 426.

2. Petitioner's contention that the Board erred in holding that the checkers and cost clerks employed in its industrial relations department are "employees" within the meaning of Section 2 (3) of the Act rests throughout upon the fallacious

assumption that that holding requires petitioner to make available to the Union information which petitioner, for reasons of its own, desires to withhold (Pet. 8, 15–17, Br. 10–11, 29–34). That assumption is wholly unwarranted by anything appearing in Board decisions or in the opinion of the court below. Both in its original opinion (R. 522) and in its opinion on rehearing (R. 559) the court below made it perfectly clear, as did the Board (*supra*, pp. 10, 13–14, 15, and note 7), that petitioner may require its employees, as a condition of employment, to refrain from disclosing to third parties information which petitioner regards as confidential (R. 522, 559). Such a requirement, enforceable by the economic power of the employer, patently affords an adequate safeguard to petitioner's interest in non-disclosure.

Petitioner contends that the mere possibility that certain employees will not faithfully abide by such a prohibition should result in denial to all employees who have access to confidential information of their rights under the Act. Petitioner's argument is of a piece with that advanced by the employer-publisher in *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, to the effect that editorial writers should be denied the protection of the Act because, if they were permitted to organize and bargain collectively, their loyalty to their union and to labor union principles would tend to induce them to color and

distort their writings. This Court rejected the argument, holding that the employer was amply able to protect against such dereliction of duty by exercising its undoubted right to discharge "an incompetent editor or one who fails faithfully to edit the news to reflect the facts without bias or prejudice" (301 U. S. at 132).

Were petitioner's argument adopted it would mean that countless clerks and office workers whose duties bring them into contact with any information which an employer chooses to regard as confidential would be denied the protection of the statute. Such a result, as the court below noted (R. 521), would be entirely incompatible with the statutory objectives; it would deny equality of bargaining power to employees who, when acting individually, are ordinarily "helpless in dealing with [their] employer," "dependent * * * on [their] daily wage," and "unable to leave the employ and to resist arbitrary and unfair treatment." *National Labor Relations Board* v. *Hearst Publications, Inc.,* 322 U. S. 111, 127.

The Board and the court below considered extension of the benefits of the Act to the employees involved both in terms of the alleged danger to employer interests which would result and in terms of the need of such employees for collective bargaining. Compare *Republic Aviation Corp.* v. *National Labor Relations Board,* 324

U. S. 793; *National Labor Relations Board* v. *Illinois Tool Works*, 153 F. 2d 811, 815–816 (C. C. A. 7). Both the Board and the court below concluded, on the one hand, that such extension would not seriously endanger employer interests in nondisclosure of confidential information, and, on the other hand, that the statutory safeguard was essential to adequate protection of vital employee interests (R. 467–468, 520–522, 559). Under these circumstances, it can hardly be contended that the court below erred in holding reasonable the Board's considered judgment that the interests of the employees must prevail. *Republic Aviation* and *Illinois Tool* cases, *supra*. There are no contrary holdings.

Petitioner's assertion (Pet. 8, 9, 14–17, Br. 13, 30–34) that the court below erred in upholding the Board's finding that the discriminatory transfer of Cornforth, Cowger and Donahue from positions in the industrial engineering department to lower paying production jobs was violative of Section 8 (3) of the Act rests on the same fallacious assumption, discussed above (*supra*, pp. 17–20), that employees who have access to "confidential" information are a part of management and therefore not entitled to the protection of the Act. In rejecting that contention the Board and the court below held that to deprive employees of positions in which they had access to such information solely because they were mem-

bers of the Union plainly constituted discrimination in violation of Section 8 (3) (R. 151, 527). That holding is clearly correct and no conflict of decisions is presented.

3. Finally, petitioner contends that the Board and the court below erred in refusing to hold that Cornforth, Cowger and Donahue wilfully incurred losses by refusing to accept the lower paying production jobs which petitioner discriminatorily offered them, and in failing to include as earnings of the employees the sums they would have earned had they accepted those jobs (Pet. 9, 11, Br. 11, 13–14, 35–36). Basically, it is petitioner's position that the employees were required to submit to petitioner's discrimination against them; to accept the lower paying production jobs which differed completely in character from the jobs from which they were discharged; and that their failure to do so should redound to petitioner's benefit. But, as the Board and the court below pointed out (R. 151–152, 528), petitioner's requirement that these employees transfer from their jobs in the industrial engineering department to production jobs was unlawful; their discharge by petitioner because of their unwillingness to comply with that illegal requirement was in no sense voluntary, but was rather the foreseeable consequence of petitioner's discrimination against them. Controlling decisions in this court and in the circuit courts of appeals uniformly

support this view. *Continental Oil Co.* v. *National Labor Relations Board,* 313 U. S. 212, 213–214 (remanded for further consideration of another question); *National Labor Relations Board* v. *Star Publishing Co.,* 97 F. 2d 465, 468–471 (C. C. A. 9); *National Labor Relations Board* v. *American Potash and Chemical Corp.,* 98 F. 2d 488, 493–494 (C. C. A. 9), certiorari denied, 306 U. S. 643; *National Labor Relations Board* v. *Chicago Apparatus Co.,* 116 F. 2d 753, 757, 759 (C. C. A. 7); *National Labor Relations Board* v. *Viking Pump Co.,* 113 F. 2d 759, 762 (C. C. A. 8); *Clover Fork Coal Co.* v. *National Labor Relations Board,* 97 F. 2d 331 (C. C. A. 6), enforcing 4 N. L. R. B. 202, 227, 240–241; *National Labor Relations Board* v. *A. Sartorius & Co.,* 140 F. 2d 203, 205, 207 (C. C. A. 2).

The authorities cited by petitioner (Pet. 11) do not hold to the contrary. In *Press Co.* v. *National Labor Relations Board,* 118 F. 2d 937 (App. D. C.), upon which petitioner relies, the court reversed a Board finding that an employee who resigned rather than accept a transfer to another position was constructively discharged, on the ground that the evidence showed that the employee was transferred for reasons unrelated to his union activities and that the transfer was therefore not discriminatory (118 F. 2d at 943). *National Labor Relations Board* v. *Waples-Platter Co.,* 140 F. 2d 228 (C. C. A. 5), upon which petitioner also relies, is likewise distinguishable. In that case,

unlike the instant case, the employees "were transferred to positions where the working conditions were the same or just as good as at the places they originally worked; the hours and the pay were exactly the same." (140 F. 2d at 230.) The holding of the court that under these circumstances the employees should be charged with the earnings they would have received had they accepted the transfers was narrowly limited, as the court's opinion shows, to the precise facts in that case. (140 F. 2d at 229–230.) It is consequently inapplicable here, where the employees were transferred to positions of an entirely different character, in which their earnings would have been substantially reduced (*supra*, p. 7).

CONCLUSION

The decision below is correct in all respects here challenged, and presents no conflict of decisions. The petition for a writ of certiorari should therefore be denied.

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SEPTEMBER 1946.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 1935, 49 Stat. 449, c. 372, 29 U. S. C. Secs. 151, *et seq.*, are as follows:

> SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.
>
> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and

by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

SEC. 2. When used in this Act—

* * * * *

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer),

or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer. * * *

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. * * *

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

SEC. 9. * * *

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required

to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue * * * an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the

pleadings and testimony upon which such order was entered and the findings and order of the Board. * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

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